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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 93.

HENRY T. McKINNEY,
Petitioner,
v.
THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF

For the Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

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For the Respondent, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

QUESTIONS PRESENTED.

a) Does the collectively bargained agreement here involved create a right to position and seniority in Petitioner, cognizable under the Universal Military Training and Service Act of 1951 when the contract gives Petitioner no fixed or ascertainable right thereto?

b) Does the Universal Military Training and Service Act of 1951 require the employment of a veteran in a position which he might or "probably" would have achieved but to which he had no contractually or otherwise established right?

c) Should the Complaint have been dismissed because the Petitioner, asserting purported position and seniority rights under the collectively bargained agreement, failed to allege that he followed or exhausted the grievance procedures prescribed by said agreement?

d) Did Petitioner waive his rights, if any, under the Universal Military Training and Service Act by his apparent acquiescence in his employer's action and by his failure for a period of some three years to invoke contractual grievance procedures or to file suit?

e) Did the District Court below lack jurisdiction over the parties and the subject matter herein because the Railway Labor Act vests exclusive jurisdiction in the premises in the National Railroad Adjustment Board?

STATEMENT.

Petitioner's complaint, lodged in the District Court below, sought the enforcement of alleged re-employment rights against the carrier-Respondent under Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, pp. 4-5 (R. 2-10). The Brotherhood Respondent was, upon proper petition, permitted to intervene and upon motions by both Carrier and Brotherhood, the District Court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 15-16). The United States Court of Appeals for the Tenth Circuit affirmed on appeal in McKinney v. Missouri-Kansas-Texas R. R. Co., 240 F. 2d 8 (R. 17-22).

The complaint (R. 2-5, 9-10) alleged that the Carrier and Brotherhood Respondents have extant between them a collectively bargained agreement, in effect since August 1, 1925, concerning all classes of clerical employees including Petitioner. By Rule 1 (R. 5) clerical employees are classified as Groups 1, 2 and 3 and prior to his military service Petitioner was in Group 2. Rule 1 (a) (R. 6) provided as follows:

> (A) Rules of this agreement as herein written will apply to employes in group two (2). Promotion will be confined to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability, after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1).

Rule 1 (c) (R. 6) provided that "seniority of employes will be restricted to the respective group in which employed * * *." Rule 4 (R. 6) provided that "Seniority begins at the time the employe's pay starts in the respective branch or class of service * * *." Rules 27-29 (R. 8-9) spell out a series of procedural steps for the protection of employes who deem themselves unjustly discharged and Rule 31 (R. 10) makes that grievance procedure available to an employe who considers himself otherwise unjustly treated" * * *. Rules 27-33 augment the grievance procedures with additional rights of appeal.

The petition alleges that complainant, then a Group 2 employee, on September 26, 1950, entered the Armed Forces for training and service and so continued until September 25, 1952, when he satisfactorily completed such period as allegedly evidenced by certificate.

The complaint further alleges that during Petitioner's military service on September 15, 1952, a Group 1 position

(bill clerk) was assigned to one Fabian, a non-employee, and that on September 22, 1952, another Group 1 position (assistant cashier) was assigned to one McGuan, also a non-employee. On October 1 Petitioner made application for reemployment and on October 7, 1952, was assigned to the above described assistant cashier position and given a seniority date of October 7, 1952, which he alleges he "duly protested" asserting that his seniority date should be September 8, 1952, or September 10, 1952.

Petitioner served as assistant cashier until September 9, 1953, when said position was abolished. Petitioner alleges that he sought to exercise his alleged seniority and place himself in the above described position of Bill Clerk but, that same was denied him and he was assigned to a less desirable position in which he subsequently served until the filing of the complaint on June 3, 1955.

Relief sought by Petitioner is that his seniority be fixed as of September 8, 1952, or September 10, 1952, and that he recover alleged lost wages.

SUMMARY OF ARGUMENT.

The dismissal of the complaint should be upheld.

Petitioner stated no legally recognizable claim under the Universal Military Training and Service Act of 1951. The collectively bargained agreement upon which he predicates his claim does not accord him an ascertainable or fixed right to the position and seniority which he claims. Its provision as to advancement to Group 1 by Group 2 clerks is purely precatory and places such advancement in the sole discretion of the employer based upon fitness, ability and other considerations. Petitioner erroneously seeks that the District Court determine that he have a position which he **might** or **probably** would have received and assay his fitness and ability for a promotion for which he had no right but which lay entirely within the discretion of the employer. The fact that the employer elected to place Petitioner in one Group 1 position (Assistant Cashier) in no way bears upon his entitlement to another (Bill Clerk). Petitioner by this action seeks drastically to enlarge the scope of the Universal Military Training and Service Act of 1951, far beyond its stated language and meaning as judicially construed.

The complaint and contract exhibit attached thereto prescribe certain grievance procedural steps which must be adhered to with respect to the rights of employees thereunder. Failure of Petitioner to follow those procedural requisites compels dismissal of the complaint.

In addition, the complaint reflects on its face that Petitioner waived his rights, if any, under the Universal Military and Training Act of 1951 by his apparent acquiescence for a period of years in the carrier's action and his failure until 1955 to file suit herein.

Finally, the District Court lacked jurisdiction herein because exclusive jurisdiction over the parties and subject matter is vested by the Railway Labor Act in the National Railroad Adjustment Board to the exclusion of the Courts. The Universal Military Training and Service Act of 1951 did not expressly or impliedly repeal or obliterate the Railway Labor Act or destroy its impact because one of the parties involved is a veteran.

The complaint was properly dismissed below.

ARGUMENT.

I.

Relief Must Be Denied Plaintiff Because He Had No Right Under the Universal Military Training and Service Act of 1951 to the Position, Seniority and Pay Claimed.

a) **Under the Applicable Agreement Plaintiff Has No Right or Entitlement to the Position and Seniority Status Claimed.**

Petitioner endeavors to catapult himself into prevailing in this case by a process of distorting and enlarging upon the meaning and impact of the Universal Military Training and Service Act of 1951 (65 Stat. 75), 50 U. S. C., App. 451, and the applicable collectively bargained agreement. By a tenuous, if resourceful, process of ascribing to both act and contract language and meaning, which are simply non-existent, he emerges with his theory for recovery.

First, as to the law, Petitioner asserts that under the Universal Military Training and Service Act of 1951 the returning veteran is entitled to judicial promotion to a position which he **probably** would have achieved had he not gone into military service even though he has no contractual or fixed right to same. If the desired position is one which could have been attained only on the basis of selection from Group 2 and his fitness and ability, Petitioner would have the District Court assay his fitness and ability and then conjecture as to whether the employer would or might have promoted him to positions for which he was eligible or available, even though he had no right or entitlement to them.

The plain language of the Act coupled with judicial construction thereof permit no such fanciful or unrealistic

result. Simply and clearly, under the act the returning veteran is entitled "to a position which on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which, he would have held if he had remained continuously in his civilian employment." He is entitled not to lose ground, be penalized or to suffer in his seniority status because of military service. The Act's benefits extend however only to such re-employment on the seniority escalator as exist as a matter of ascertainable right and not to such conjectural or speculative promotions as he might or might not achieve based upon his being considered fit and able to fill a job which chanced to open. We fully subscribe to the "escalator principle" as spelled out in **Fishgold v. Sullivan Drydock & Repair Corp.**, 328 U. S. 275, and **Trailmobile Co. v. Whirls**, 331 U. S. 40. Those cases, however, do not uphold Petitioner's contentions. Indeed, both admonish against the super-seniority claimed by petitioner here.

The contract here does not create a right which when fitted into the fabric of the Universal Military and Training Act of 1951 would entitle Petitioner to the position and seniority claimed.

Rule 1, upon which Petitioner must rely, divides clerks into several groups and explicitly provides that seniority and promotions are confined to an intra-group basis save that Group 2 employees, based on fitness and ability, will be given preference over non-employees in the assignment to Group 1 positions. This fixes no rights to promotion to Group 1 and is merely precatory in nature. It could not be otherwise because the preference extended is to any and all Group 2 clerks for any and all Group 1 positions. No definite or ascertainable mode of making such promotions is in any wise indicated nor is there any basis created for selecting any particular Group 2 employee. Rule

four (4) establishes that an employee's seniority in any branch or class commences when pay starts and under Rule five (5) the exclusive determination of fitness and ability is vested in the appointing officer. Hence, the contract pleaded and relied upon by Petitioner gives him no absolute, fixed or certain right, predicated upon seniority alone, to promotion to Group one (1), but rather extends to him only a limited preference to Group one (1) promotion, carefully restricted to a fitness and ability basis. The conjectural possibility that plaintiff might have been promoted to Group one (1) had he not been in the military service, is not enough to entitle him to relief under the Act relied upon.

Petitioner in attempting to delineate his rights under the contract overstates and inflates its provisions, all beneficially, of course, to Petitioner. Repeatedly, Petitioner's brief refers to his having been "in line for promotion" to Group I on September 8 and 10, 1952, and his purportedly having become "eligible" for such promotion on those days. Plunging on, the brief then concludes that he probably would have been promoted, that he seemed to have the necessary fitness and ability and, hence, a cause of action is stated here. This is sheer nonsense! Petitioner was no more "in line for promotion" or "eligible" for same on September 8 and 10 than he and every other Group 2 employee would be every day. Any Group 2 employee, regardless of seniority therein, might under the contract receive preference. The precatory language is so broad, however, that it is clear that no rights whatever are created in Petitioner or any other Group 2 clerks, all of whom are referred to generally in the section of Rule 1 involved.

An interesting aspect of Petitioner's brief is the section at pages 20-21 where much is made of the fact that the carrier, exercising its broad discretion, did place Petitioner in the Group I Assistant Cashier position. Such was the

contractual prerogative of the carrier for which the carrier need offer no explanation. Petitioner seemingly asserts that somehow this action proves or reflects that the carrier should also have placed petitioner in the Bill Clerk position. Such boot strap climbing is wholly unwarranted by the contract. The simple fact is that the carrier could have placed **any** Group 2 employee or any non-employee in either Group 1 position without any violation of Petitioner's rights.

Further, the Petitioner admitting that he has no right to the position and seniority claimed seems to envision that the District Court should endeavor, by retracing what might have happened had Petitioner not gone into the service, to appraise Petitioner's fitness and ability and the possibility that the carrier might in its discretion have put him in the Group 1 position. This is a type of proceeding far beyond the scope of the Universal Military Training and Service Act of 1951 and points up the correctness of the dismissal of the complaint.

Under the circumstances here presented, it is clear that plaintiff under U. M. T. had no seniority right to the position and status claimed and accordingly, the complaint must be dismissed. The authoritative cases uphold this contention.

A veteran who, at the time he entered service, was designated as "traffic manager" was held in **Meehan v. National Supply Company**, 160 F. 2d 346 (C. A. 10, 1947), not to be entitled, upon his return to service, to a position designated as "general traffic manager," created during the veteran's training period. The Court held that the purpose of the Act was to preserve to those who entered the military service full benefits of the position which they occupied at the time of entering the service, but stated that such did not justify a strained construction of facts in order to give a returning veteran a higher position than

the one he occupied at the time he entered service or a new position created after he was in the service.

In **Oil Workers, etc., v. Sinclair Refining Company**, 171 F. 2d 192 (C. A. 5, 1948), the Court said (l. c. 194):

> "We agree with the arbitrators that it would take a strained construction of the law and the contract to entitle the returned veteran to exercise his option on a job one step removed from the one on which he was denied the opportunity to exercise his option by reason of his absence for military service."

Governing here is **Raulins v. Memphis Union Station Company**, 168 F. 2d 466 (1948, C. A. 6), wherein it was held that veterans who had been, prior to service, electrician's helpers were not entitled to re-employment as electricians, merely on the basis that the time spent by them in the service should be used in computing seniority for a promotion from electrician's helper to electrician since the seniority provided by the collectively bargained agreement applied only within a single job classification and did not apply with respect to promotion from one grouping to another.

Polansky v. Elastic Stop Nut Corporation, 78 F. Supp. 74 (D. C., N. J., 1948), held that where differences in classification were based on the particular skill and ability of the employe and not solely upon length of service, the Court could not assume or speculate that the returning veteran would have been promoted had he not been in military service.

The rule here contended for was well stated in **Harvey v. Braniff, etc.**, 164 F. 2d 521 (C. A. 5, 1947), wherein the Court said (l. c. 522):

> "Where an employee has no fixed or absolute right to promotion and where his right to promotion de-

pends upon qualifications over and above mere length of service, the employer has fully complied with the terms of the Selective Training and Service Act when he restores the veteran to the same position or one of like seniority and pay which he held at the time of his induction into the service."

In **Hewitt v. System Federation**, 161 F. 2d 545 (C. A. 5, 1947), the classifications of carman helpers and car cleaners (a lower grouping) were by agreement separate and there was no interlocking seniority although the railroad-employer usually offered car cleaners the opportunity to qualify as carman helpers as vacancies occurred. During plaintiff's military service a number of car cleaners, including one junior to plaintiff, were promoted to carmen helpers. In instructing the District Court to dismiss the complaint, the Seventh Circuit said (l. c. 546):

"We agree with appellants that as a general proposition the attachment of rights to the seniority of employees is accomplished only by contract, that is to say, the sole source from which seniority rights have accrued is through some form of private contract. Ryan v. New York Cent. R., 267 Mich. 202, 255 N. W. 365; Polanskey v. Monongahela R., 342 Pa. 188, 19 A. 2d 377. In the Act here involved, Congress recognized the existence of seniority systems and seniority rights within the framework of the existing system and undertook to give the veteran protection, plus a guarantee against demotion. Fishgold v. Sullivan Drydock & Repair Corporation, supra, 328 U. S. 288, 66 S. Ct. 1112. In our case the car cleaners and the carman helpers, by their collective bargaining agreement, had separate seniority rights among themselves, without a provision whereby an employe classified as a car cleaner might transfer and be classified as a carman helper on the basis of seniority rights. In this state of the record, the trial court, having found as a fact

that "At the time of petitioner's (appellee's) induction into the Armed Forces there was a contract of seniority within the classification of car cleaners as well as a contract of seniority within the classification of carmen helpers, but at no time has there been a contract of seniority governing promotion from the classification of car cleaner to the classification of carmen helpers' and 'That petitioner (appellee), at the time of his induction into the Armed Forces, had no right to promotion from the classification of car cleaners to the classification of carman helpers by virtue of any custom or any written contract' was in error in directing the railroad to place appellee's name on its seniority list before the names of the eight individual appellants and assigning to appellee the seniority date of April 18, 1943."

In **Bond v. Tennessee Coal, Iron & R. Co.**, 73 F. Supp. 333 (D. C. Ala., 1947), a pre-military service assistant payroll clerk sought the rating of payroll clerk upon discharge. He was denied relief because, the Court held, seniority as to time would be pertinent to his promotion only if "ability" and "physical fitness" were equal. In denying relief the Court made the following finding of fact:

"5. Petitioner, at the time when he left the position of Assistant Payroll Clerk for the purpose of entering the armed forces, had no fixed, or absolute, right to promotion to the position of Payroll Clerk, by virtue of any contract, written or otherwise, or by virtue of any custom or practice. At no time material hereto, did the right to promotion from the position of Assistant Payroll Clerk to that of Payroll Clerk depend solely on the length of continuous service in the position of Assistant Payroll Clerk. While the Assistant Payroll Clerk, oldest in point of service in such position usually was given preference in filling a vacancy

as Payroll Clerk such fact did not ipso facto, entitle him to be promoted, as other factors were given consideration."

The cases belabored by Petitioner do not support his fanciful theories and can be briefly disposed of.

Oakley v. Louisville & N. R. Co., 338 U. S. 278, 94 L. Ed. 87 (1949), contributes nothing to appellant's contention here. It only holds that the expiration of the one-year statutory period did not terminate the veterans' re-employment or other rights under the act. The Court there stated that his seniority status continues beyond that year "subject to the advantages and limitations applicable to the other employees."

Furthermore, **Diehl v. Lehigh Valley Railroad Co.**, 348 U. S. 960, 99 L. Ed. 749 (1955), was a memorandum opinion reversing the court below on the basis of the **Oakley** opinion and is "dispositive" of nothing—particularly so far as the case at bar is concerned. The facts there bore no resemblance to those at bar and, inasmuch as there was no opinion of the Supreme Court, no meaningful illumination is furnished here. At the most, one could glean from the memorandum opinion that a union contract executed after a veteran's return from service could not, by requiring certain periods of temporary service as a qualification for promotion, defeat the veteran's rights under the Selective Service Act.

Morris v. Chesapeake & Ohio Railway Company, 171 F. 2d 579 (C. A. 7, 1949), involved no issues touching upon those at bar. The holding of that case was merely that the qualified veteran was excused from "bidding in," during the service period, a job to which his seniority clearly entitled him, and that he could do so upon his return from service. Essentially the same situation prevailed in **Conner v. Pennsylvania Railroad Company**, 177 F. 2d 854 (C. A. D. C., 1949). Both cases involved fixed and ascertainable

rights and bear no relevance to the issues in the instant case.

It is clear that the returning veteran by virtue of the Act is not entitled to superseniority or any seniority or rights greater than those conferred by a collectively bargained agreement. **Fishgold v. Sullivan Drydock and Repair Corporation**, 328 U. S. 275, 11 Labor Cases No. 51,232. It is further established that such agreement, entered into prior to the veteran's entry into service and not discriminatory as to veterans, will fix such matters as status, seniority, promotions and other benefits. 2 C. C. H. Lab. Law Rep., page 7056.

In essence the above demonstrates that Petitioner is here asserting a purported right which is not predicated upon the contract involved and which goes far beyond the protection accorded by the Universal Military Training and Service Act of 1951. Petitioner concedes, in effect, that this case is an effort to extend that law to placing returned veterans into positions, to which they have no right, but which they might have attained had the employer in its discretion determined so to promote them. Such a principle is without basis in law and would annihilate the salutary objectives of the act.

b) **Plaintiff has not complied with the grievance and other procedural steps spelled out in and required by the collectively bargained agreement involved and upon which he relies.**

The contract involved provides a further insuperable barrier to relief here. Plaintiff freely concedes that his right to the seniority claimed is predicated solely upon the collectively bargained agreement. He seeks to pick and choose certain clauses (dealing with promotion) and to rely tenaciously on them. He utterly disregards other provisions of that agreement and seeks judicial determination without reference to them. It was not the stated

word or implied intention of the U. M. T. that the grievance procedures of collectively bargained agreements be annihilated and the Courts required to substitute for them.

Inextricably interwoven with this argument is the fact that the Clerk's Agreement provided in Rule 27, Rule 31, et seq. for elaborate and speedy intra-company hearings and appeals for the employee with a grievance, including those revolving about promotion and seniority. No allegation is made in the complaint that these were invoked or pursued. Until they are pursued and defendant has acted thereunder, it could not be said that defendant denied seniority or other rights to plaintiff. In **T. W. A. v. Koppal**, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906 (1953), it was held that where an employee, treating himself as unlawfully discharged (and, therefore, not required to go to N. R. A. B.) lodges a common law action for unlawful discharge he must show an exhaustion of his administrative or grievance remedies under the contract of employment, if the applicable state law requires.

Plaintiff here failed to exhaust his administrative and grievance remedies. He therefore has no right to proceed in this action. Rule 27, Rule 31, et seq. of the contract are so clear that the Courts of Oklahoma would unmistakably require plaintiff to exhaust his contractual administrative grievance remedies before being permitted to maintain this action. We submit that the following quotation from 31 American Jurisprudence 881, Labor, Sec. 123, is applicable:

> "In general, where a collective agreement provides for an extra judicial means of hearing and determining disputes growing out of grievances of employees or the interpretation and application of contracts between employer and employees, an employee should exhaust the remedy provided before resorting to the courts."

Our position here is buttressed by **Polansky v. Elastic Stop Nut Corporation**, 15 Labor Cases No. 64563, 78 F. Supp. 74 (1948, D. C. N. J.), wherein it was held that the veteran relying for seniority status under the Universal Military Training and Service Act or its predecessors on a labor agreement must show himself to be in compliance with it, including the timely and proper resort to grievance procedures.

Further support for our position is found in **Wood v. Glen Alden Coal Company**, 73 F. Supp. 871 (D. C. Pa., 1947); **Mraz v. Presto Lock Company**, 16 Labor Cases No. 64013 (D. C. N. J., 1947); **Van Vloten v. News Syndicate Company**, 17 Labor Cases No. 65520 (D. C. N. Y., 1950), and **Willoughby v. A. T. & S. F. Railway Company**, 14 Labor Cases No. 64464 (D. C. Kan., 1948).

It must be borne in mind that the grievance procedures here described are, under the Railway Labor Act, closely interlocked with National Railroad Adjustment Board procedures which constitute the next step and which are actually a continuation of the collective bargaining process.

Clearly, the rights of plaintiff here asserted are founded entirely on the collectively bargained agreement. He was reemployed in a job better than the one he had upon entry into service. If he had additional seniority rights they could only flow from the agreement, which is not a piecemeal assortment of separate rights but rather an integrated contract with seniority provisions interwoven with others, including such subjects as grievance procedure. To rely upon the agreement, plaintiff must fulfill his duties under it including the timely invocation of its carefully spelled out grievance procedure. Plaintiff's complaint establishes that he failed in that obligation and accordingly dismissal is required.

The Universal Military Training and Service Act does not destroy contracts and throw all parties into expen-

sive time taking litigation when simple and binding contractual grievance procedures are not only available but required before relief may be sought in the Courts.

c) **Plaintiff's failure to file this suit at or near the time that his seniority date in Group I was set and his failure timely to pursue the grievance procedure under the collectively bargained agreement constitute waiver and require the dismissal of the complaint.**

Plaintiff alleges that his seniority date in Group I was assigned in October, 1952, as being "October 7, 1952," and that he "Protested" same. He alleges no other steps to assert his rights and therefore may be presumed to have taken none to procure a different seniority date until this suit was filed. Clearly, he went to work on the assigned basis, filed no suit, failed to invoke the grievance procedures of the agreement and patently led both Respondents to believe that he acquiesced and concurred in his assignment and seniority date. Thus misled, the carrier paid Fabian in his position, replaced McCuan by plaintiff and all with plaintiff's apparent consent. In September, 1953, plaintiff was placed in Group 2 because of the abolishing of the assistant cashier position. Plaintiff alleges that he "requested" the Bill Clerk's post but upon his requests being denied he commenced working in a Group 2 position and took no further action of any nature or description until June 3, 1955, almost two years later when this suit was filed. In good conscience, the Courts could not permit recovery now.

All of plaintiff's rights admittedly flow from the collectively bargained agreement here involved. Yet he utterly failed to comply with that agreement in that he did not lodge his request for hearing under Rule 31 and pursue other procedural steps carefully spelled out in Rules 27-33. Whatever rights plaintiff had under Rule 1 could be asserted only as provided for in other rules. By his non-com-

pliance with the grievance procedure rules, plaintiff has waived and eradicated any right of recovery which he might have had.

The rights of a veteran under the Universal Military Training and Service Act may be waived if same is done in a clear and unequivocal manner. In **Hastings v. Reynolds Metals Co.**, 165 F. 2d 483 (C. A. 7, 1947), a returned veteran, while on terminal leave, entered into a written contract with his prior employer, terminable at will. When the employer did terminate the written contract, the veteran then endeavored to rely on his veteran's right. He was held to have waived same. So, in **Walsh v. Chicago Bridge and Iron Co.**, 90 F. Supp. 322 (D. C. Ill., 1950), a returned veteran was first re-employed in his employer's shipbuilding division but subsequently accepted employment in the unrelated "permanent business organization" where he worked for some three years and was then discharged. At that juncture he attempted to assert his veteran's rights but the Court held same to have been extinguished because of his waiver.

And thus, here, the veteran after brief re-employment in Group II accepted a job in Group I but **not** the job to which he would have been entitled under his tenuous seniority theory. Although he alleges generally that he "protested" he does not allege that he pursued the contract's grievance procedure with its time limitations and he waited for more than a year to file suit. Unqualifiedly, whatever rights he had under the contract and the Universal Military Training and Service Act were waived and extinguished.

That act is not intended to be an avenue of entrapment of the employer or the source of his being misled, over a long period of time, into duplicate pay to a veteran and non-veteran because the veteran ostensibly acquiesced for several years in his assigned re-employment, and then, abruptly changing course, filed suit. In October, 1952, at

the time of his re-employment, plaintiff had all the information he ever could acquire about his seniority date and rights. His failure to invoke the contractual grievance procedures and his delay of several years to file suit—all the time apparently acquiescing in his job—constitute, as reflected by the face of the complaint, a waiver which bars any recovery on his part.

II.

The District Court Lacked Jurisdiction Over This Action Because Exclusive Jurisdiction Over the Parties and the Subject Matter Thereof Is Vested in the National Railroad Adjustment Board by the Railway Labor Act, No Part of Which Was Repealed by the Universal Military Training and Service Act.

Although the District Judge in his Order Sustaining the Motion to Dismiss specified that the order was predicated upon "the reason that the complaint fails to state a claim for which relief can be granted against the defendant, this Court will uphold the action of the District Judge if this Court finds that the complaint should have been dismissed for that reason or for other asserted reasons. **Dowd v. United Mine Workers of America**, 235 F. 1 (C. A. 8, 1916).

We submit that the District Court lacked jurisdiction over this action because exclusive jurisdiction over the parties and the subject matter is vested in the National Railroad Adjustment Board by the Railway Labor Act (C. 681, 48 Stat. 1185), 45 U. S. C., Ch. 8, Secs. 151-188, no part of which was repealed by the Universal Military Training and Service Act.

If the District Court had heard this cause on the merits, the grievance concerning seniority would have been determined and the Court would have been compelled to interpret the collectively bargained agreement between the

Respondents. Such interpretation would include the issue as to whether or not plaintiff has a seniority right of promotion from Group two (2) to Group one (1), whether plaintiff has a meritorious grievance and related issues turning on Rules 1, 4, 6, 15, 27, 28, 29, 30, 31, etc., of the Agreement.

Under the Railway Labor Act exclusive jurisdiction to determine the issues herein, interpret the Agreement and adjudicate plaintiff's grievance is vested in the National Railroad Adjustment Board.

An adequate consideration of this question must commence with a brief review of the history, nature and objectives of the Railway Labor Act.

The Railway Labor Act represents the culmination of some sixty years of thoughtful effort on the part of the federal government, railroad labor and the carriers to create machinery through which harmonious labor relations might be achieved and maintained. This objective is a particularly vital one because of the immeasurable importance to the public of stable and uninterrupted rail road service. Railroad labor relations prior to the Railway Labor Act had in many respects been turbulent and chaotic principally because of the inadequacy of the machinery provided therefor.

The objectives of the Railway Labor Act are stated therein as being the avoidance of interruption of commerce or the operation of carriers engaged therein, the establishment of harmonious relations between carriers and their employees, and the affording of machinery for the prompt and orderly settlement of disputes growing out of grievances or the application of collectively bargained agreements.

The National Railroad Adjustment Board was created to determine and adjudicate grievances and disputes con-

cerning the interpretation of agreements. This Board is constituted of eighteen (18) members paid, selected by and representing the national railroad labor organizations, and eighteen (18) members paid, selected by and representing the carriers. The Board is divided into four divisions, based on the crafts or classes of employees. All of the issues here involved are within the jurisdiction of the Third Division. The Act further provides that if disputes falling within the province of the N. R. A. B. fail of adjustment in the usual manner by the parties, either or both may refer the dispute to the N. R. A. B. Simplified pleadings and formal hearings are provided for. Should the members of a division deadlock, a "referee" is selected who will sit with the board in its further deliberations and make an award. Awards of the board must be in writing and are "final and binding" on the parties "except insofar as they shall conta a money award."

A series of authoritative decisions of the Supreme Court and other appellate courts have firmly established that the mode of adjudicating grievances and interpreting railway labor agreements prescribed by the Railway Labor Act is exclusive and cannot be encroached upon by the courts and that it is, in effect, a continuation of the contract negotiating and administering process. **It has uniformly been held that the matters within the province of the Board's jurisdiction cannot be determined by the courts even though there is some jurisdictional base which, but for the Railway Labor Act, would warrant the assumption of jurisdiction by the courts.**

In **Slocum v. D. L. & W. R. R. Company**, 339 U. S. 239, 94 L. Ed. 795 (1950), a declaratory judgment suit had been filed by one union in order to determine whether certain work fell within the scope of its contract or that of another union. In denying the jurisdiction of the courts to make such determination, the Supreme Court said:

"The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for judgment of railroad employe disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications.

"Our ground for this holding was that the Court 'should not have interpreted the contracts . . .' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S., at 567, 568. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

A plethora of sound and binding decisions have recognized the unassailable proposition that the Federal Courts have absolutely no jurisdiction to interpret collectively bargained railway labor agreements. In **M.-K.-T. R. R. Company v. B. R. C.**, 188 F. 2d 302 (C. A. 7, 1951), the Court said (l. c. 305):

"There is no question now but that the courts have absolutely no jurisdiction to interpret agreements between carriers and their employes or to settle disputes arising out of the construction of such agreements. That principle has been so firmly established by a series of decisions construing § 3 of the Railway Labor Act that we deem it unnecessary even to cite authorities."

That the adjudication of grievances under and the interpretation of railway labor agreements is exclusively the affair of the National Railway Adjustment Board is judicially established beyond the pale of dispute. **O. R. C. v. Southern R. R. Company,** 339 U. S. 255, 94 L. Ed. 811 (1950); **O. R. C. v. Pitney,** 326 U. S. 561 (1945); **Washington Terminal Company v. Boswell,** 124 F. 2d 235 (C. A. D. C., 1941).

The all-important issue here is whether the Universal Military Training and Service Act somehow, in railroad employe cases, obliterates the careful and unique scheme of the Railway Labor Act. Most significant is the fact that no express or implied provision of the act would indicate such an intention on the part of Congress. Restoration of re-employment in a position of "like seniority, status and pay" is guaranteed and indeed was admittedly under the complaint granted here by defendant. Nothing in U. M. T., however, justifies or hints that the District Court may go on under 50 U. S. C. A., App., Sec. 459, and determine in Railway Labor cases that the employe has a justifiable grievance and then, interpreting the collectively bargained agreement, that plaintiff is entitled to a better job than the one he left because of seniority. That subject matter remains with N. R. A. B. and in such a case we urge that suits under U. M. T. would be applicable, if at all, only after N. R. A. B. and subsequent Railway Labor procedures had been invoked and the employer had ultimately refused to comply with the award.

That issue, here presented, has not heretofore been adjudicated—perhaps because other plaintiffs have not endeavored to supercede the Railway Labor Act with U. M. T. And over-all appraisal of the problem and tenor of U. M. T. decisions clearly establishes that matters exclusively within N. R. A. B. jurisdiction cannot be adjudicated by the Courts.

This would appear to be true because the Courts have tangentially indicated that where there is a well defined contractual or legal scheme for determining a seniority question, that will be a condition precedent of or perhaps a bar to action under U. M.-T. **Wood v. Glen Alden Coal Company,** 73 F. Supp. 871 (D. C. Pa., 1947); **Mraz v. Prests Lock Company,** 16 Labor Cases No. 64,013 (D. C. N. J., 1947); **Van Vloten v. News Syndicate Company,** 17 Labor Cases No. 655,520 (D. C. N. Y., 1950); **Willoughby v. A. T. & S. F. Railway Company,** 14 Labor Cases No. 64,464 (D. C. Kan., 1948).

That the Universal Military Training and Service Act was not intended to obliterate National Railroad Adjustment Board jurisdiction is further buttressed by the fact that in its proceedings the Board is statutorily obliged to give notice to parties "involved." Fabian, whose job and livelihood are ultimately at stake here, might well be held by that Board to be entitled to notice in order to avert a denial of due process of law to him. Certainly a piecemeal determination by the District Court below, ignoring Fabian, would inevitably lead to further multiplicity of administrative and Court proceedings.

Whether Fabian is a party "involved" in this dispute is a complex question which can be competently determined only by the Adjustment Board. Notice is not required in all cases (**Whitehouse v. Illinois Central Railroad Company,** 349 U. S. 365, 99 L. Ed. 1155 [1955]), but it may well be required (see **Nord v. Griffin,** 86 F. [2d] 481 [C. A. 7, 1936]; **Estes v. Union Terminal Co.,** 89 F. [2d] 768 [C. A. 5, 1937]; **B. R. T. v. Templeton,** 181 F. [2d] 528 [C. A. 8, 1950]; **Kirby v. P. R. R.,** 188 F. [2d] 793 [C. A. 3, 1950]; **M-K-T R. R. Co. v. B. R. C. et al.,** 188 F. [2d] 302 [C. A. 7, 1951]).

In commenting on the need for notice in this type of case, the following was said in **M-K-T R. R. Co. v. B. R. C. et al.,** 188 F. (2d) 302 (C. A. 7, 1951):

"We can think of no employee having a more vital interest in a dispute than the one whose job is sought by another employee or group of employees."

We believe that Congress by limiting essential parties in U. M. T. cases to employer and employee clearly reflected that it did not contemplate this type of action being adjudicated by District Courts.

Fabian has an interest here. Whether he is entitled to notice is a question resolvable only by N. R. A. B. The law does not contemplate the District Court having jurisdiction over this action.

The confusion and injustice which would result from the ousting of the National Railroad Adjustment Board of its jurisdiction is patent. Among the incongruous consequences are the following:

If the District Court took jurisdiction, Fabian (the employee to be displaced), shorn of the procedural rights granted him under the Railway Labor Act, would either have to stand idly by or else go to the expense and trouble of intervening herein. If the District Court upheld McKinney, Fabian would, under the contract and the Railway Labor Act, have the right to pursue his grievances through prescribed channels and to the National Railroad Adjustment Board, where notice of his claim might be given to McKinney under cases cited above. Were the Board to decide for Fabian and were such award, entitled as it is to prima facie weight, upheld in a statutory suit for enforcement, the carrier would find itself in the absurd dilemma of having two employees, entitled to the same job and to the same back pay—and both under a decree of a United States District Court. Patently Congress intended no such result.

Furthermore, the expertize of the N. R. A. B., which Congress so painstakingly provided for, would be lost.

The pattern of railway labor grievance handling, under contracts and under the Railway Labor Act, would be haphazardly interrupted and discarded whenever a veteran was involved. Seniority problems, often concerning a long list of employees, would be irrationally split and submitted to far-flung, unrelated tribunals. Because carriers may submit disputes to N. R. A. B., the same dispute might be simultaneously presented to a District Court and the N. R. A. B.—and perhaps with different results. Veteran and non-veteran employees might be put to an eternal race of diligence to lodge claims in the Courts or the N. R. A. B. and the carriers might often enter the fray asserting their rights.

The question presented here is one solely involving seniority and interpretation of a railroad labor agreement, the precise subjects which the National Railroad Adjustment Board is geared to handle. This case in no event involves discrimination against a veteran as such and the District Court could not make any determination other than the one which the Adjustment Board would make.

We urgently submit that the Universal Military Training and Service Act did not repeal the Railway Labor Act and that a common sense interpretation of the two would leave no doubt, but that the Railway Labor Act procedures if applicable must precede a veteran's invoking U. M. T. relief.

To sustain the appellant's position, this Court must hold that the Universal Military Training Act has repealed or superceded the Railway Labor Act. Pertinent is the fact that U. M. T. not only does not expressly in terms repeal or supercede the Railway Labor Act but indeed there is no language of any nature or description contained in the Universal Military Training and Service Act, 50 U. S. C., App. 459 (d), which reflects any Congressional intention to repeal or supplant the Railway

Labor Act. We must explore the issue as to whether that Act was repealed (as to returning veterans) by implication because of inconsistency or repugnancy to the Railway Labor Act.

It is fundamental that repeal of statutes by implication is not favored in law and will not be upheld unless the repugnance or inconsistency is so clear and plain as to be beyond the range of reconciliation. **Arthur v. Homer,** 96 U. S. 137, 24 L. Ed. 811 (1877).

It is patent that the Acts are not inconsistent at all, save for the plaintiff-veteran who seeks to distort and exploit his veteran's rights to bring him special privilege. It is clear and elementary that the Congressional intent was to assure veterans against discrimination following military service. In the particular area of plaintiff's work Congress had already conferred upon covered railroad workers the substantial benefits of the Railway Labor Act which non-railroad workers do not enjoy. Obviously, where a complaining employee who is both a veteran and a railroad worker is involved, he must first pursue his rights under the Railway Labor Act and there a full and quite advantageous remedy is available to him. If the employer fails then to accord him those rights the Universal Military and Training Act might give such an employee a further vehicle for self protection. The acts are not inconsistent, but rather cumulative.

An equally pertinent rule of statutory construction is that a general act does not repeal a special, specific or particular act unless same is done expressly. **Ex parte Kan-gi-shun-ca,** 109 U. S. 556, 27 L. Ed. 1030, 3 S. Ct. 396 (1883).

The Railway Labor Act is a special and particular act designed to assure stability in railroad and other transportation by spelling out extensive procedures and rights

as to labor relations. The Universal Military Training and Service Act is a general enactment conferring rights on all veterans in whatever industry or employment. It does not expressly repeal or mention the Railway Labor Act and indeed is not inconsistent with it. Patently U. M. T. does not repeal the Railway Labor Act, which must simply be read together with U. M. T. and construed as an exception thereto. See **U. S. ex rel. Gillett v. Dern**, 74 F. (2d) 485, 64 App. D. C. 81 (C. A., D. C., 1934); **U. S. ex rel. v. Burnet**, 65 F. (2d) 195, 62 App. D. C. 107 (C. A., D. C., 1933).

Actually, the Railway Labor Act, as to railway employees, provides a detailed, delicate, precise machinery, meticulously geared to the exact needs of the railroad industry to accomplish the objectives which are generally intended by the Universal Military Training and Service Act to cover all employments, lumped together. The plaintiff will receive equal—and more expert—justice from the Adjustment Board as he could from a District Court.

We urge that the National Railroad Adjustment Board has exclusive jurisdiction over the parties and the subject matter herein and that it is in no wise repealed or superceded by the Universal Military Training and Service Act. The underlying objectives of both enactments will be best achieved by reading them together.

Petitioner cannot lightly brush aside the lack of jurisdiction in the District Court for the reasons stated herein.

CONCLUSION.

For the reasons stated above it is respectfully urged that the judgment below should be affirmed. The rights asserted by petitioner are without basis under the Act or the collectively bargained agreement. Petitioner seeks to distort and extend the Universal Military Training and Service

Act to create for himself a posture wholly without legal foundation. Such result is further compelled because the District Court lacked jurisdiction over this action because of the impact of the Railway Labor Act.

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Certificate of Service.

I hereby certify that on this ..... day of October, 1957, I served three copies of the foregoing brief on J. Lee Ranken, Esq., Solicitor General; George Cochran Daub, Esq., Assistant Attorney General; Samuel D. Slade, Esq., and John G. Laughlin, Jr., Esq., Department of Justice, Washington (25), D. C., attorneys for petitioner; and three copies of the foregoing brief on Wayne R. Howell, Esq., M. E. Clinton, Esq., and Dan M. Welch, Esq., Barrett Building, Denison, Texas, attorneys for Respondent Missouri-Kansas-Texas Railroad Company, by mailing same, properly addressed, to each of them by first-class United States mail with postage prepaid.

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Carroll J. Donohue.